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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 639

PRICE BROTHERS COMPANY,

Petitioner,

vs.

FRANK SMITH.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

A. M. HENDERSON,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 639

PRICE BROTHERS COMPANY,
Petitioner and Appellee Below,

vs.

FRANK SMITH,
Respondent and Appellant Below.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the United States:

I.

Summary of Matter Involved.

The legal question here involved is whether one can prosecute a remedy to final conclusion and accept the benefits thereof and thereafter prosecute another and wholly inconsistent remedy for the same injuries and retain the benefits of both.

This is an action at law brought in the United States District Court, for the Northern District of Ohio, Eastern Division, by Frank Smith, respondent herein, against Price

Brothers Company, petitioner herein, for damages for personal injuries.

At the conclusion of all the evidence, the trial court instructed the jury to return a verdict in favor of petitioner (R. 176). The respondent prosecuted appeal, and the judgment of the trial court was reversed and a new trial ordered by the Circuit Court of Appeals.

A—Respondent's Complaint.

The original complaint (R. 187) was filed against The Babcock & Wilcox Company and The Babcock & Wilcox Tube Company on August 1, 1940, and alleged that as a result of the negligence of the named defendants, respondent, on June 18, 1940, sustained severe bodily injuries while in the employ of petitioner (respondent while working on a scaffold was thrown to the ground when it was struck by a hoisting cable).

On February 15, 1941, respondent filed an amended complaint (R. 2) and added the petitioner as a party defendant. He omitted the allegation contained in the original complaint to the effect that at the time of the accident he was in the employ of petitioner.

B—Petitioner's Answer.

On May 7, 1941, petitioner filed its separate amended answer (R. 6) and asserted several defenses, but the one with which we are here concerned is that of estoppel.

Petitioner alleged that it was a contributor to the Ohio Workmen's Compensation Fund and that subsequent to the accident respondent filed an application with the Industrial Commission of Ohio for Workmen's Compensation necessarily predicated upon the fact that he was an employee of petitioner; that such Commission found that he was an employee of petitioner at the time of the accident

and awarded him compensation and he accepted such compensation and was accepting it at the time of the trial; and that by reason thereof he was estopped from maintaining his action. (The law of Ohio provides that an employer contributing to the Workmen's Compensation fund shall not be liable to an action at common law by an injured employee.)

C—The Proof

The other defendants were dismissed and the action proceeded only against petitioner.

On June 8, 1940, respondent and one Meglan, who claimed to be operating as a partnership, submitted to petitioner, who was erecting a building for Ohio-Edison Company at Toronto, Ohio, the following written proposal (R. 181):

"Columbus, Ohio, June 8, 1940.

Price Pros.,
General Contractors,
Toronto, Ohio.

Re: Ohio Power Co., Addition, Toronto, Ohio.

Gentleman:

We proposed to furnish all labor, materials and equipment necessary to clean exterior brick and stone masonry, clean interior face brick masonry and do necessary pointing of brick and stone masonry on the above job for the sum of $560.00.

We also propose to furnish swinging scaffold and necessary equipment, you to furnish materials and pay for actual time worked on the job at mason's wages ($1.75 per hour) the total cost of materials and labor not to exceed $560.00. We are to receive the difference between actual cost and $560.00.

We agree to do all work in a neat workmanlike manner according to plans and specifications.

Respectfully submitted,

FRANK P. MEGLAN COMPANY,
By FRANK P. MEGLAN."

All negotiations were carried on by Meglan (R. 62).

Petitioner's evidence tended to prove that Meglan was told that he and respondent could not do the work as sub-contractors unless he presented certificates showing that the Meglan Company carried public liability insurance (R. 134, 135, 149) and that, if such certificates were presented, they could have the job as sub-contractors; while, if they were not presented, they were to be placed upon the payroll of petitioner. It is conceded that no certificates of coverage were furnished.

Meglan testified that no such conversation occurred, and simply stated that he was not told which proposal petitioner did accept (R. 108).

The legal distinction between the two proposals is certainly not clear, but the question of estoppel does not depend upon the existence of a distinction and so we shall not indulge in comment.

On June 17th, respondent and Meglan commenced work (R. 16) and on the following day the accident occurred (R. 18). Respondent was taken to a hospital and remained there about seven weeks (R. 22). A day or two after the accident, petitioner's paymaster called Meglan to his office and drew up an ante-dated acceptance of the proposal of June 8th (R. 155). He testified that he wanted to reduce the terms of the oral acceptance to writing (R. 150).

Meglan testified that the paymaster simply suggested this ante-dated acceptance and the putting of respondent upon petitioner's payroll, and he acceded to this sugges-

tion (R. 99). Meglan testified that he never informed respondent of what had been done (R. 116).

On July 5, 1940, there was filed with the Industrial Commission of Ohio an application for Workmen's Compensation by respondent (R. 204).

A portion of this application was filled out by respondent's paymaster, a portion by respondent's attending physician, who presented it to respondent to be signed. His physician died before the case was called for trial (R. 41, 42). Respondent testified that at the time this was presented to him it was in blank and he was told by his physician that it was simply something for the State (R. 76). Respondent further stated that, although he did not know what he was signing at the time, he thought when he received his first check for Workmen's Compensation that it was an application for Workmen's Compensation but upon the basis that he was entitled to compensation as an employee of his partnership (R. 76, 77). (Under the Ohio law, partner employees are not entitled to Workmen's Compensation. However in fairness to respondent, he may not have known this.)

Respondent testified that he continued in this belief until his deposition was taken in Columbus, Ohio, on October 25, 1941—approximately five weeks before trial (R. 74).

The evidence offered by petitioner disclosed that on October 8, 1940—almost fourteen months prior to trial and over four months prior to the filing of the amended complaint against petitioner, respondent's attorneys examined his file at the Industrial Commission for the purpose of learning his status (R. 78; Def's. Exs. C & D, R. 192, 193), and thereupon learned that the award of compensation to respondent was made by the Commission upon the basis that he was an employee of petitioner at the time of the accident. Nevertheless no withdrawal of respondent's application for Workmen's Compensation was ever made and

he continued to accept the awards of the Industrial Commission (R. 74, 168, 169).

D—Judgment of District Court.

The District Court, in directing a verdict for petitioner (R. 176), held that respondent could not retain his claim for Workmen's Compensation under the Workmen's Compensation Act, which was based upon the relationship of employer-employee, and at the same time maintain a suit against petitioner for the same injuries upon the theory that he was not an employee, but an independent contractor.

E—Decision of Circuit Court of Appeals.

The Circuit Court of Appeals held that the respondent was not estopped from instituting the present suit because, under his state of the evidence, he did not believe that he was obtaining Workmen's Compensation on the basis that he was an employee of petitioner, but entertained the erroneous belief that he was receiving such benefits as an employee of his partnership; that under his state of the evidence his application for Workmen's Compensation was void and no jurisdiction was conferred upon the Industrial Commission, and the question of whether or not he had estopped himself from maintaining this action was a question of fact for the jury to decide.

The court gave no consideration whatever to the knowledge obtained by respondent's attorneys when they examined his file at the Industrial Commission.

II.

Questions Presented.

The questions presented are as follows:

1. Is the knowledge which an attorney gains in the course of his employment by a client imputed, as a matter of law, to such client?

2. Is one who has accepted and retained benefits of one remedy estopped from thereafter seeking recovery for the same injuries upon another and wholly inconsistent remedy?

3. Where the facts upon which estoppel is asserted are undisputed, should the issue of estoppel be submitted to a jury, or should such issue be decided by the trial court?

III.

Reasons Relied Upon for the Allowance of the Writ.

We respectfully submit that this petition for writ of certiorari should be granted for the following reasons:

A. The decision of the Circuit Court of Appeals, in ignoring the knowledge obtained by respondent's attorneys and in failing to hold as a matter of law that the respondent had estopped himself from maintaining this action, are decisions of important questions of local law probably in conflict with local applicable decisions.

B. The decision of the Circuit Court of Appeals so far departs from the usual and accepted judicial course of proceedings as to call for an exercise of this court's power of supervision.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals, for the Sixth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said court had in the case numbered and entitled on its docket No. 9285, Frank Smith, Appellant, *vs.* Price Brothers Com-

pany, Appellee, to the end that this cause may be reviewed and determined by this court, as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by this court and the judgment of the District Court affirmed, and for such further relief as to this court may seem proper.

A. M. HENDERSON,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 639

PRICE BROTHERS COMPANY,
Petitioner and Appellee Below,

vs.

FRANK SMITH,
Respondent and Appellant Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

I.

Opinions of Courts Below.

The opinion of the Circuit Court of Appeals is found at page 218 of the record and reported in

The opinion of the District Court is found on page 176 of the record.

II.

Jurisdiction of This Court.

The date of the judgment to be reviewed is December 1, 1942 (R. 217).

The statutory provision which is believed to sustain the jurisdiction of this court is

28 U. S. C. A., Sec. 347.

III.

Statement of the Case.

We have heretofore recited in our petition all the facts essential to a determination of the law applicable.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

2. The Circuit Court of Appeals erred in not affirming the judgment of the District Court.

3. The Circuit Court of Appeals erred in not holding, upon the undisputed facts disclosed by the evidence, that respondent had estopped himself from prosecuting this action.

4. The Circuit Court of Appeals erred in holding that the question of whether or not respondent had estopped himself was a question of fact for the jury.

V.

Summary of Argument.

The respondent, by accepting workmen's compensation from the Industrial Commission of Ohio, has estopped himself from maintaining this action.

We realize that every favorable intendment must be accorded respondent's state of the evidence. Therefore,

we start from the point that respondent, at the time of his application for Workmen's Compensation from the Industrial Commission of Ohio, did not know that he was applying for it upon the basis that he was an employee of petitioner. However, on October 8, 1940, respondent's attorneys, who had been selected and chosen by him to prosecute this action and in whom he was entrusting his case, learned that the signed application of respondent to the Industrial Commission of Ohio asserted that the respondent was an employee of petitioner at the time of the happening of the accident, and their receipt (Def's. Ex. C; R. 192) very clearly shows that they were inspecting his file for the purpose of determining his status. Having obtained this information, they, nevertheless, on February 15, 1941, filed the amended complaint against petitioner seeking to recover damages from it upon the basis that respondent was not its employee but an independent contractor. In the meantime, respondent continued to accept his compensation payments.

The question at once arises as to the legal effect of this knowledge so gained by respondent's attorneys. Was it communicated to him? Should it have been? Was there any legitimate reason why it should not have been? Respondent simply says that it was not. Should respondent and his attorneys be permitted to now take such a position?

Both Federal and State courts have unanimously held that what an attorney learns in the course of the prosecution of his client's claim or business, is imputed and chargeable to the client. Any other rule would permit litigants to perpetrate untold fraud and litigate with reckless abandon. An attorney and his client, just as any other agent and principal, and regarded as a unit, and, except in those cases where an attorney seeks to defraud his client or has obtained information of such a character that it would be a breach of ethics to communicate it to him, the law indulges

a conclusive presumption that that which an attorney learns is chargeable to his client.

This court, in the case of *Smith et al.* v. *Ayer et al.*, 101 U. S., 320, 25 L. Ed. 955, in dealing with this question, held as follows in the first syllabus:

> "Information to an attorney is information to his client, and the latter is affected with notice of all facts, which notice can be charged upon his attorney."

And again in the case of *Rogers* v. *Palmer,* 102 U. S. 263, 26 L. Ed. 164, this court held as follows in the first syllabus:

> "On the question whether the plaintiff in a judgment on which goods were taken in execution, knew of the defendant's insolvency and of the intent to evade the bankrupt law, the knowledge of plaintiff's attorney is the knowledge of plaintiff."

In the case of *The American Export & Inland Coal Corp.* v. *The Matthey Addy Co.,* 112 O. S. 186, the Supreme Court of Ohio used the following language in the second syllabus:

> "The general rule that notice to an agent is notice to his principal applies to the relation of attorney and client, and an attorney's notice or knowledge of facts affecting the rights of his client will be considered notice to the latter."

The following text is found in 5 Amer. Juris., p. 302:

> "The well established general rule that notice or knowledge of an agent, while the agency exists and while he is acting within the scope of his authority, is imputed to his principal, is applicable to the relation of attorney and client; notice to the attorney is notice to his client, at least where the attorney receives such notice in the course of the transaction in which he is acting for his client, and where it comes in such a manner that he may communicate it to the client or act upon it without any violation of a duty. The test is whether

the information is of a character which it is the duty of the attorney to communicate."

Thus it is at once apparent that the knowledge of respondent's attorneys, gained by them from their examination of his file before the Industrial Commission, must be imputed to respondent.

In addition to this, the evidence discloses that the respondent knew on October 25, 1941, that he had been receiving compensation on the theory that he was an employee of petitioner. Yet between then and the time of the trial, on December 1, 1941, neither he nor his attorneys made any effort whatever to withdraw his application for Workmen's Compensation and he continued to hold himself eligible for payments.

We, therefore, proceed to the next proposition applicable; namely, what legal effect does respondent's acceptance of compensation on the basis that he was an employee of petitioner have on his right to prosecute this action?

It is a matter of logic that one cannot be an employee of another and at the same time be, with respect to that other, an independent contractor. Respondent has discarded this rule of logic and this fundamental rule of fair play. For the purpose of obtaining all of the benefits accruing to him under the Workmen's Compensation Act, he is an employee of petitioner. For the purpose of this action he is not an employee, but an independent contractor. What an utter disregard of the sanctity of courts! He claims that at the time he signed the application for Workmen's Compensation he was in such pain and under the influence of narcotics to such an extent that he did not realize what he was doing, and therefore his application was void and the Industrial Commission was clothed with no jurisdiction or authority whatever. Even conceding this to be true, he later learned otherwise. We do not urge estoppel because he signed this

application. We are urging estoppel because he has accepted its benefits. A man who does not speak when he should, may not speak when he would. Regardless of whether or not the Industrial Commission of Ohio was clothed with jurisdiction pursuant to his application for compensation, he is now estopped from questioning that jurisdiction. No person should be permitted to travel two such inconsistent roads at the same time.

The Supreme Court of Ohio has laid down a clear cut rule regarding such action, and indeed we might say it is consistent with every rule of the proper administration of justice. In the case of *Conrad, Admrx.* v. *Coal Co.*, 107 O. S. 387, the facts were as follows:

Plaintiff's decedent was killed while in the employ of defendant. An application for Workmen's Compensation was filed by plaintiff with the Industrial Commission of Ohio, who found that the decedent was killed after his day's work was over and therefore she was entitled to no compensation. Thereafter she sued her decedent's employer, who urged that she had made an election of remedies and was estopped from prosecuting an action against it based on negligence.

The Supreme Court in dismissing defendant's claim of election of remedies adopted the syllabus in the case of *Water, Light & Gas Co.* v. *Hutchinson*, 160 Fed. 41. That syllabus reads as follows:

> "The fact that a party through mistake attempts to exercise a right to which he is not entitled or has made choice of a supposed remedy which never existed and pursued it until the court adjudged that it never existed, does not preclude him from afterwards pursuing a remedy for relief to which in law and good conscience he is entitled."

Upon the question of estoppel, the court uses the following language, on page 393:

"Since we have decided that there was no statutory waiver, was the applicant concluded by an estoppel of record evidenced by the finding of the Commission against her?

"According to the allegations of the reply, the Commission found that at the time of injury Conrad was not in the employ of defendant, nor injured in the course of employment. Had the finding of the Commission been in her favor, or had she accepted compensation under the act, an estoppel would arise, since she could not thereafter consistently sue on the theory that the deceased was not covered by the act. One cannot pocket the fruits of the act and later disclaim it."

This, we respectfully urge, is exactly the respondent's position in the case at bar. He has pocketed the fruits of the Workmen's Compensation Act, which was not only enacted for his protection but for his employer's protection as well; and still retaining its benefits, he seeks the benefits of this wholly inconsistent remedy.

In the case of *Industrial Commission* v. *Broskey,* 128 O. S., 372, the same principle was again enunciated. The facts were as follows:

Broskey was a bus driver for an Ohio corporation which operated a bus service from Canton, Ohio, to Pittsburgh, Pennsylvania. While returning from Pittsburgh, Broskey's bus left the highway and he was injured. Broskey's employer was a contributor to the Workmen's Compensation fund, and he filed an application for Workmen's Compensation and accepted payments. Shortly after, he filed suit against his employer for damages for the same injuries. Upon learning of this, the Commission stopped further payments to him pending the outcome of the action. His employer set up, among other defenses, an application for and an acceptance of Workmen's Compensation. The case

was not tried, but was settled by his employer by the payment of $6500.00.

Thereafter Broskey pursued his claim against the Industrial Commission. The court, in its opinion, made the following observations: (pp. 381-386)

> "The election or selection of a forum is of little consequence only in so far as it affects the doctrine of estoppel. Unless Broskey's recovery from his employer in an action at law took away his right to proceed against the Industrial Commission for compensation, and unless the law weaves the facts in this case into the woof of non-liability, then Broskey's recovery from his employer amounts to just so much piffle, so far as this case is concerned, provided, of course, that Broskey under all the other attendant facts and circumstances is entitled to participate in the Workmen's Compensation Fund.
>
> "Leaving out of consideration the question as to the extra territorial jurisdiction of the Industrial Commission of Ohio and the interstate commerce phase of the case, can an employee, after having sued and recovered from an employer who was a contributor to the State Insurance Fund an amount satisfactory to him as damages for his injury on the theory that his case was not compensable, afterward be permitted to participate in the State Insurance Fund on account of the same identical injury?
>
> "If such contention could be maintained, is it not time to remove the blindfold from the eyes of the goddess that lawyers worship, so that she can see what is the matter with her scales?
>
> * * * * * * *
>
> "Broskey should have everything to which 'in law and good conscience he is entitled.' That is the proposition exactly. Broskey has it. He is now seeking that to which 'in law and good conscience' he is not entitled. If Broskey discovered his error of law before settlement, he should have dismissed his action at his own

cost in 'good conscience'; and if he discovered it afterward, he should have returned to his employer 'in good conscience' the sum of $6500, which his employer paid him by way of settlement, apparently in 'good conscience.' If good conscience is a part of the criteria in an action at law, then both parties should follow it.

"We are not denying Broskey his right to recover in this action for pursuing the $6500, but for getting it.

* * * * * * *

"The Industrial Commission is the administrator of the State Insurance Fund. It stands between the employer and the employee and is the handmaiden to both. Its primary duty is to see that each is accorded fair treatment by the other. If an employee sues an employer who is a contributor to the State Insurance Fund, and such employer does not see fit to set up such fact and stand upon it as a bar to the action, and instead settles with the employee for a substantial amount satisfactory to the employee, then it becomes the duty of the Industrial Commission, if such employee subsequently sues it for compensation, to plead the fact that such employee has been compensated by his employer. The Industrial Commission owes it to such employer not to take any more of his money to pay an employee whom he has fully paid. The Industrial Commission owes it to all employers to see to it that they shall not be required to pay compensation twice, and it owes it to the employees to see to it that no employee shall be compensated twice, to the end that the fund will be able to respond to the demands of future claimants who have not been compensated by their employers for their injuries. When Broskey settled with his employer in this case, the employer went out of the picture, and the Industrial Commission, its handmaiden, went with it."

We say that in the case at bar, when respondent continued to accept Workmen's Compensation, both before and after

the filing of this action, the petitioner, so far as he was concerned, went out of the picture.

As stated by the Supreme Court of Ohio, the petitioner, as a contributor to the Workmen's Compensation Fund, is interested in payments made to injured employees. After all, it is the money of employers which goes to make up this fund, and respondent in retaining the benefits of his award was being paid money which, in turn, had been paid into this fund by petitioner. These statements by the Supreme Court of Ohio clearly refute any argument which respondent may assert to the effect that petitioner was a stranger to the proceedings of the Industrial Commission.

The Circuit Court of Appeals cited the case of *Affield* v. *The Paige Dairy,* 11 O. App. 122, in support of its decision. We submit that the question of estoppel was not in that case. There an employee was tricked and defrauded into signing an application for Workmen's Compensation. Upon learning what had been done, he attempted to withdraw his application for compensation, and thereafter he sought no relief nor accepted any of its benefits. The Commission refused to permit him to withdraw his application, and he then disregarded its refusal and sued his employer at common law. The latter asserted as a defense that the Commission had adjudicated that he was an employee of defendant and therefore could not prosecute the action.

The Court of Appeals held that under the allegations of the petition plaintiff's application for Workmen's Compensation was void and the Industrial Commission obtained no jurisdiction. There was no defense of estoppel asserted. The defense was simply that the Industrial Commission had obtained jurisdiction.

How different from the case at bar! The petitioner's defense of estoppel is not based upon the fact that the

Industrial Commission had jurisdiction to determine his claim. It makes no difference whether it did or did not have jurisdiction. This defense is based upon his own acts and conduct. Estoppel is not urged because be filed an application for Workmen's Compensation. It is asserted because he has continued to accept the benefits of that application, knowing all the while that he was receiving funds on the basis that he was an employee of this petitioner. He has taken his position—he cannot now take another.

In the *Conrad* case, *supra,* if the Commission had made an award to plaintiff and she had accepted it, that Commission would have, so far as her later claim for wrongful death at common law was concerned, acted solely without jurisdiction, but the Supreme Court of Ohio said that nevertheless she would be estopped from prosecuting such an action if she had accepted the benefits of the Commission's finding.

The foregoing Ohio cases, in our opinion, clearly govern the principle of estoppel which is applicable here, and in accordance with the pronouncement of this Court in the case of *Erie Railroad Co.* v. *Thompkins,* 304 U. S. 64, it was the duty of the Circuit Court of Appeals to follow the rule of law prescribed by the highest court in the State of Ohio. Petitioner's defense of estoppel is based upon undisputed facts. We respectfully urge that the Circuit Court was grossly in error in concluding that the issue of estoppel should have been submitted to the jury. Where the facts upon which estoppel is predicated are in dispute, the issue is obviously a jury question, but where, as here, there can be no dispute, no question for a jury is presented. The Supreme Court of Ohio has enunciated the principle of law applicable to the undisputed facts in this case. It, therefore, follows that it was the duty of the trial court to apply

such law to the facts, and the action of the Circuit Court should be reversed and that of the District Court affirmed.

Respectfully submitted,

A. M. HENDERSON,
Counsel for Petitioner.

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FILED
JAN 26 1943
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1942.

No. 639.

PRICE BROTHERS COMPANY,
Petitioner and Appellee Below,

vs.

FRANK SMITH,
Respondent and Appellant Below.

BRIEF OF RESPONDENT

To Petition and Brief of Petitioner for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1942.

No. 639.

PRICE BROTHERS COMPANY,
Petitioner and Appellee Below,

vs.

FRANK SMITH,
Respondent and Appellant Below.

BRIEF OF RESPONDENT
To Petition and Brief of Petitioner for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

To the Honorable Supreme Court of the United States:

Inasmuch as the controlling facts in this case are so vitally important to a correct determination of it, we respectfully submit our Statement of Facts, in contradistinction to the Statement of petitioner herein, and to simplify matters, will refer to the petitioner as the "Price Company," and the Respondent as "Smith"; said respondent being the plaintiff in the original action and petitioner being the defendant.

This was an action for damages against the defendant, Price Company, on account of personal injuries sustained by plaintiff, Smith, on June 18th, 1940, when he was hurled from a scaffold by reason of the negligence of defendant while he was engaged, as an independent contractor, in the performance of certain brick and masonry cleaning work on a new building at Toronto, Ohio.

At the time of this accident, Smith was a partner in the contracting firm known as Frank P. Meglan Company,

engaged in the business of cleaning brick and masonry work, and had been a partner in said firm for about seven (7) years prior thereto.

Frank P. Meglan, on behalf of said partnership, entered into a contract with Price Company about June 5th or 6th, 1940, whereby said Frank P. Meglan Company agreed to perform certain brick cleaning work on said new building, which Price Company had constructed and erected as general contractor for the Ohio Edison Company, and in consideration whereof, Price Company agreed to pay the Frank P. Meglan Company the sum of Five Hundred Sixty ($560.00) Dollars. (R. pp. 88, 181.)

Under the agreement thus entered into, Frank P. Meglan Company commenced to perform certain work on June 17, 1940. On the following day, while both Frank P. Meglan and Smith were engaged in the performance of said work, and standing on a swinging scaffold suspended along the west side of the outer wall of said building, defendant, Price Company, negligently caused and permitted a hoisting cable to strike the scaffold in such a manner that it was suddenly and violently jerked, causing Smith to be hurled therefrom to the ground, from which he sustained a broken neck and other serious and permanent injuries. (R. pp. 93 and 31.) Smith was taken to the Steubenville Hospital several miles distant from the point of the accident.

Two days after the accident, W. C. Garvin, purchasing agent and paymaster for Price Company, called Frank P. Meglan to his office and suggested to Meglan that Smith be placed upon the payroll of the Price Company, so that Smith could obtain workmen's compensation under the Ohio Workmen's Compensation Act, to which suggestion Meglan said "If you think that is the best thing, all right"; but Smith was wholly ignorant of any such arrangement. (R. pp. 98, 99, 157.)

Pursuant to such arrangement and suggested manipulation of the records by the Paymaster of Price Com-

pany, one Dr. Casey, representing the Price Company, called upon Smith a day or two after that and only three or four days after the accident, while Smith was confined in the hospital under the influence of opiates and suffering great pain and mental and physical distress as the result of his severe injuries, and had Smith sign some paper in blank, which Dr. Casey said, was "for the State." (R. p. 81.) Smith did not, at any time, understand, nor was he told, that it was an application for state workmen's compensation; the first time he became fully aware that it was an application for compensation was when he began to receive checks from the Industrial Commission of Ohio, and then he assumed that they were checks due him by reason of the fact that his own firm, Frank P. Meglan Company, was also a contributor to the State Insurance Fund (R. pp. 82, 83, 184); the Ohio State Compensation voucher did not designate the name of the employer, and the first intimation that Smith had that he was getting the checks by reason of Price Company coverage was on October 24th, 1941, when counsel for Price Company took his deposition (R. p. 74), and he was not definitely aware until the progress of his trial brought forth additional information.

Notwithstanding the fact that the evidence clearly showed that Smith was an independent contractor, and that his signature was obtained to the Workmen's Compensation Application by Price Company in the manner as briefly set forth, the Trial Court instructed the jury to render a verdict in favor of the Price Company upon the ground that Smith was an employee of the Price Company and having filed an application for compensation, Smith was therefore estopped from prosecuting his common law action against the Price Company.

The evidence indisputably shows that Smith was employed as an independent contractor.

While this fact was disputed by counsel for the defendant, principally upon the basis that Smith had filed an application for workmen's compensation, which indi-

cated that he was an employee of the Price Brothers Company, defendant, nevertheless all of the evidence with the exception of this disputed application for compensation clearly, definitely and conclusively shows that Smith was an independent contractor.

ARGUMENT AND LAW.

It is conceded that the Ohio Workmen's Compensation Law is applicable only to employees—and not to independent contractors.

The evidence clearly indicates that Smith was not an employee of Price Brothers Company, and, therefore did not come within the scope of the Workmen's Compensation Law. Hence, the all-controlling question to be determined upon trial was the status of Smith at the time he was injured; that was the first thing that should have been determined, and it would be the jury's function to determine it, not the Court's. If the jury had determined that Smith was an employee of Price Company, and not an independent contractor, it would be required to return a verdict for the defendant; for if Smith were an employee of the Price Company, his only remedy would have been the Workmen's Compensation Act. But, since Smith was an independent contractor, his proper and only legal remedy is this action in tort against the defendant, Price Company.

Simply one or two essential and fundamental propositions were necessary to be determined by the jury, under proper instructions of the trial court. For instance:

> *First:* Whether or not he was an employee of the Price Brothers Company within the purview of the Workmen's Compensation Act. If the jury, under all the facts and circumstances, found that he was, then, in that event, the jury's functions would end and a verdict for the defendant would necessarily have to be rendered.
>
> *Second:* On the other hand, if the jury, under all the facts and circumstances, found that he was not

an employee of the Price Brothers Company, but that he was, at the time, in truth and in fact, an employee and partner of an independent sub-contractor, then it would be the duty of the jury to determine whether there was negligence on the part of the Price Brothers Company directly and proximately producing the injuries that he sustained, and if the jury found that the defendant was negligent, directly bringing about the injuries, the jury then should award him such an amount that in their judgment would justly and fully compensate him for such injuries.

The application for compensation supposedly signed by Smith should have been introduced solely for the purpose of bearing upon the question as to whether or not he was an employee of Price Company, and for no other purpose; the application should have been introduced simply as a circumstance tending to prove the fact that he either was or was not an employee of Price Company. But the value or the weight to be given to such application should have been determined by the jury from all the facts and circumstances.

For instance, did he intend to file an application? Did he know he was filing an application for compensation? Did he believe that he was filing an application for compensation from the Price Brothers Company? What was his state of mind and physical and mental condition at the time his signature was obtained upon such application? Those were some of the questions for the *jury* to determine.

The evidence in this respect tends to show indisputably that his signature was obtained upon a paper, not knowing that it was an application for workmen's compensation; that if he had known that it was an application for state compensation, he would not have signed it; that he did not intend to apply for any workmen's compensation from the Price Brothers Company; and that he was truly ignorant of the fact that he was making application for compensation. (R. pp. 73-74.)

Under all these facts, it was for the jury to determine what weight and value they were to give to that circumstance (signing the application) as bearing upon the questions of whether or not he was an employee of Price Brothers Company.

The Ohio Law that should have been followed.

We respectfully submit that, under the facts, the following cases clearly chart the course that the trial court should have taken:

Perry vs. The M. O'Neil Co., 78 O. S. 200:

Court's Opinion at page 209:

"* * * If a party suing to recover for personal injuries *admits the execution* of a release and seeks to avoid it on equitable grounds, he must obtain that relief to maintain his action, *when he denies the execution of the release,* or that it is his act, on the ground of want of mental capacity at the time he signed it, or that his signature to the release was procured by fraud, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which he did not intend to give, he may maintain his action without obtaining a decree."

Accordingly such pronouncement of the law of the Supreme Court of Ohio was applied in case of an employee executing an application for compensation while mentally incapacitated and without his knowledge and consent:

Affield v. The Paige Dairy Company, 11 O. A., page 122:

"2. A fraudulent and void application for compensation from the State Insurance Fund, executed by an employee while mentally incapacitated and filed without his knowledge or consent, does not bind such employee or confer jurisdiction upon the Industrial Commission."

"3. In an act
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v. The M. O'Nei
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and followed.)" ction brought under the provisions of , General Code, the question of mental ecute an application for compensation insurance fund is one of fact for the per instructions from the court. (*Perry eil Co.*, 78 Ohio State, 200, and *Brown Mfg. Co.*, 98 Ohio State, 440, approved

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mission of Ohio the Court, at page 123, said: I. Affield, the plaintiff in error, was em- kman in the automobile repair depart- endant. While engaged as such work- jured in an elevator accident in the the defendant, on August 4, 1917." days after the injury an application n out of the state insurance fund was d and filed with the Industrial Com- * * *."

At pages 124-125:

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to the merits." 18, plaintiff, ignoring the application ng theretofore had, filed his petition leas Court of Lucas County claiming he defendant company on account of ned to have been received while in the company at their place of business defendant company answered, and in se set up the application by Affield from the state insurance fund on uries, and all the proceedings relative n for leave to withdraw by Affield, roceedings and the application to be secution of the suit in the Common the second defense they answered

At page 128:

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the signing and execution of the application, and denies the filing of the same, and avers the application was not read to him; that he was told it was a report of the injury; and that at the time he was suffering great mental and physical distress because of the injuries which he had received and that he was not mentally capable at the time of transacting business of any kind or character; that he did not know and had no means of knowing the contents of the application; and that his signature was procured thereto fraudulently and that the application is wholly null and void. These averments, if true, show the application to be void and of no effect, and such a paper filed with the Industrial Commission could not confer jurisdiction on the commission to take any action in the premises, and could have no more binding effect on the plaintiff than if the application had not been made. *This being true, the plaintiff had the right to maintain an independent action, ignoring wholly any proceeding before the Industrial Commission.*"

The latter proposition announced in the *Perry* case, *supra,* is the one applicable in the instant case. That is, that appellant had a right to maintain his action—without first obtaining rescission or cancellation—and have the whole matter determined by the jury under proper instructions of the court.

The salient facts, as pertinent to this phase only, show indisputably:

(1) That Smith did not know that he was signing an application for compensation as an employee of Price Brothers Company;

(2) That he did not intend to sign any such application, although his signature was obtained to such an application.

Under those facts any such application for compensation was void *ab initio.*

Brown v. The Kiechler Mfg. Co., 98 O. S. 440:

"It is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the

same hereby is reversed; for the reason that the issue joined by the pleadings as to the mental capacity of the plaintiff to contract at the time he signed the paper writing purporting to be a release, as set forth in the answer, is a question of fact, to be determined by a jury under proper instructions, and for this reason, the trial court erred in directing a verdict for the defendant. (*Perry v. The M. O'Neil Company,* 78 O. S. 200, approved and followed.)"

Then again, the case of:

Martin, et al., v. Sentker, 12 O. A. 46, which holds:

"Syllabus 3. A void release may be ignored in plaintiff's petition, and, when relied upon by the defendant in his answer, the plaintiff by reply may set up the facts which render the release void. **A tender back of money received under a void release is not condition precedent to a right of recovery.**"

From opinion, pages 49 and 50:

"Defendants claim that the judgment should be in their favor for the reason that the plaintiff did not tender back the amount of money received by her in settlement of her claims by way of an alleged release."

"The release first appears in the case in the answer of the defendants. The reply of plaintiff denies the execution of the release in the first instance, and further claims that if her signature was obtained thereto she was mentally incapacitated at the time of signing the same, of knowing that she did sign it or of understanding what she was signing. The Court submitted to the jury the question of whether or not the plaintiff signed the release; also the question, if she signed it, whether she was mentally incapacitated at the time, establishment of which claim was placed on plaintiff. The jury resolved these issues in favor of the plaintiff. If the plaintiff did not sign the release, or signing it did not know what she was signing or that she signed it, in either event the release was void *ab initio.*"

Also, to the same effect:

Jones v. Pickle, 7 Ohio Appeals, 33 (from Court's Opinion, page 36):

"* * * We hold that no tender was necessary. * * *"

In point also, and in support of 11 Ohio Appeals, *supra:*

295 N. W. 120.
22 A. (2) 544;
4 So. (2) 128;

Smith's constitutional right clearly required the submission of his case to the jury. The trial Court did not hold that there was *no* evidence of fraud in procuring plaintiff's signature to the compensation application; in doing so, it invaded the province of the jury by weighing and considering the whole evidence and holding that Smith and not the Price Company perpetrated the fraud.

Knowledge of an Attorney.

The mere fact that one of the attorneys for Smith had permission to look over part or all of his record in the Industrial Commission, is of no consequence, nor does it in any way militate against Smith. The evidence in the record merely shows that an attorney of Smith was granted the privilege of examining the records, and nothing more. Any information acquired from the records would be immaterial to this cause of action and could not in any wise estop Smith from maintaining his common law action against the Price Company. We contend, and proved beyond any question, that Price Company conceived and acted upon the fraud and trickery to have Smith appear upon its payroll as an employee and got him to sign a blank application for compensation without his knowledge and consent, and while he was in great physical and mental distress and under the influence of opiates and narcotics.

On page 4 of Petitioner's Brief it is admitted that: "A day or two after the accident, petitioner's paymaster called Meglan to his office and drew up an ante-dated acceptance of the proposal of June 8th." Common justice dictates that he who has promoted a fraud and caused it to be committed by one upon another, can not subsequently thereto, assert such fraud as a means of relieving himself of any pecuniary liability. Then again, this action is not against the Industrial Commission of Ohio, the latter being a complete stranger to the defendant. It is nothing out of Price Company's pocket, if the Industrial Commission paid workmen's compensation to Smith.

We agree with counsel for Price Company that, as an abstract proposition of law, information obtained by an attorney while acting for and on behalf of his client, is ordinarily imputed to his client, but *such knowledge must be of such character as to materially affect the cause of action.*

Assuming, for sake of argument, that the Attorney for Smith acquired information that he did sign an application for compensation; that the attorney also acquired the information that such application was fraudulent and caused to be signed by Smith without his approval and consent, and while he was in a state of mental and physical distress which prevented him from properly transacting any such business. Does that knowledge of the attorney—even if imputed to Smith—conclusively bind Smith to submit to the jurisdiction of the Industrial Commission and automatically bar him from the prosecution of this suit against the Price Company?

Before those questions can be answered in the affirmative, two other questions must first be answered affirmatively:

1. Was a valid application filed?
2. Could Smith, under the evidence and law in this case, qualify as an applicant for compensation under the terms of the statute?

The Court of Appeals answered those questions clearly and definitely in its opinion:

1. "The facts disclosed by appellant, if true, show that the application * * * was void, not merely voidable * * *." (R. p. 223.)
2. "* * * As disclosed by the evidence and law in the case at bar, appellant could not qualify as an applicant for compensation under the terms of the statute. * * *" (R. p. 222.)

Consequently, as the Court of Appeals held, in its opinion (R. p. 223):

> "Under these conditions appellant had the right to maintain an independent action against appellee and ignore any proceedings he had theretofore instituted before the Industrial Commission, *Affield v. The Paige Dairy Company,* 11 O. App. 122."

One of the main points of discussion in the brief of Price Company is that it would be illogical for one to be an employee of another and at the same time be, with respect to that other, an independent contractor. Indeed, this is true. But Smith never, at any time, claimed to be an employee of another, he was always an independent contractor from the very beginning of the transaction to the time of his accident. Any such confusion, if existing, was created by Price Company, and not by Smith, by placing him on its payroll a day or two after the accident, and having him sign an application for workmen's compensation in blank when he was not mentally able to understand the transaction.

It is well settled in Ohio that compensation from the state insurance fund is not a bar to an action against a third person whose negligence has caused the injury:

Herbruck v. The Burger Iron Co., 44 O. A. 475:

> "In Ohio the receipt by an injured employee of compensation under the Workmen's Compensation Law is not a defense to his common-law action to recover dam-

ages for his injury from one who is not his employer under the provisions of said law."

To the same effect:

Trumbull Cliffs Furnace Co. v. Schachovsky, 111 Ohio State, 791.

Citations of Price Company Distinguished.

Industrial Commission of Ohio vs. Broskey, 128 O. S. 372, is in no way applicable to the facts of the instant case. On page 373 of the Court's Opinion it is said:

> "It is agreed by and between counsel for the claimant and counsel for the state insurance fund that on the 22nd day of September, 1929, the **claimant was employed by** *The Union Motor Transit, Inc.* * * *."

Broskey was an employee—not an independent contractor. Therefore his remedy and his *only* remedy was via the Workmen's Compensation Law.

But what about Frank Smith? Where is there any concession that he was an employee? Smith was an *independent contractor.* At any rate, it was the jury's function to decide his status, as we have heretofore pointed out.

Likewise, *Conrad vs. Coal Company,* 107 O. S. 387, is not applicable to this cause for the following reasons:

> *First:* Conrad was an employee of the employer coal company; he was in no sense an independent contractor.
>
> *Second:* Therefore, all rights or proceedings of Conrad were governed by the Workmen's Compensation Law.

Whereas Smith was not an employee of Price Brothers Company, and therefore the Industrial Commission had no *legal* jurisdiction over the matter for the reason that the relationship of employer and employee did not exist at the time of the accident.

Since Smith was an independent contractor, and therefore not in the same category as an employee of Price Com-

pany, and not amenable to the provisions of the Ohio Workmen's Compensation Law, it necessarily follows that neither the signing of the application nor the acceptance of the compensation checks—under misapprehension or otherwise—could in any way affect any rights or causes of action in tort against the appellee.

In conclusion, we submit, that there is no new question to decide in this case because the conclusions announced by the Court of Appeals for the Sixth Circuit are not in conflict with and do not constitute departures from applicable decisions and the law of the State of Ohio, therefore, the petition herein for Writ of Certiorari should be denied.

Respectfully submitted,

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